UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CORPORATION FOR COMMUNITY HOUSING,	)	
Plaintiff,	)	
v.	)	**CAUSE NO. 1:03-CV-128**
CLIFF MANAGEMENT I, LTD.,	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER

Defendant Cliff Management I, Ltd. ("Cliff"), which earlier brought a partially successful motion to compel against Plaintiff Corporation for Community Housing ("Community"), now seeks to recover its corresponding attorney fees. This Court previously decided that Cliff is entitled to an award of fees but called for further briefing on the proper amount. (Docket # 59.) For the reasons given below, the Court now holds that Cliff is entitled to $4651.43.

The first issue, however, is whether Community should be allowed to file a tardy response brief. This Court decided on May 12, 2004, that Cliff was entitled to an award of fees and granted Cliff until June 21, 2004, to file a petition and supporting affidavit demonstrating the proper amount. (*Id.* at 5.) Cliff filed its petition on June 7, 2004 (Docket # 60), so Community's response brief was due on June 25, 2004. *See* Fed. R. Civ. P. 6(a), (e); L.R. 7.1(a). Community failed to respond by that date; nonetheless, the Court later extended the deadline to August 23, 2004, at Community's request. (Docket # 66, 68.) Community missed this deadline also, but one day later it filed a "Verified Petition for Leave to Belatedly File Response" and "Proposed Response." (Docket # 76, 77.)

Federal Rule of Civil Procedure 6(b) provides that an expired deadline can be extended in the case of "excusable neglect." Fed. R. Civ. P. 6(b). Excusable neglect is "a somewhat elastic concept," and thus the Court's "determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 392, 95 (1993).

Community claims that it missed the response deadline because it was pursuing settlement with Cliff on the attorney-fees issue. On the day of the deadline, Community was waiting to hear from Cliff (whose counsel was then involved in a trial in Dallas) about a proposed settlement; even though Community received no reply by the end of the day, it nonetheless declined to file its response brief. Only the next morning, after receiving a negative reply from Cliff, did Community file its response brief. (*See* Pl.'s Verified Mot. for Leave to Belatedly File Resp.)

Although the Court appreciates the parties' efforts to settle, Community nonetheless fails to demonstrate excusable neglect. Community claims that it "waited until all hope of settlement was ended" to file its response (*id.* ¶ 8), but that was not "neglect," much less "excusable neglect"; rather, it was a conscious decision to flout a deadline set by this Court. *Medline Indus., Inc. v. Medline RX Financial, LLC*, 218 F.R.D. 170, 172 (N.D. Ill. 2003) (holding that neither "ongoing settlement discussions" nor "[a] party's belief that a case will settle" justify relief from a filing deadline). Moreover, this episode is merely the latest in a long streak of dilatory behavior by Community. To briefly recap: (1) the motion to compel which underlies Cliff's pending fee request was necessary because Community unreasonably failed to respond to dozens of Cliff's discovery requests (Docket # 43); (2) after being ordered to compel discovery,

Community failed to comply with several aspects of that order, necessitating sanctions and another order to compel (Docket # 61); (3) Community then *still* failed to fully comply, resulting in another motion for sanctions (currently pending) (Docket # 69); and (4) Community already missed the deadline to file its response brief on attorney fees once, was granted *two extra months* to do so, and still did not respond on time. Given this "backdrop of dilatory tactics," *Spears v. Indianapolis*, 74 F.3d 153, 158 (7th Cir. 1996), it is hard to imagine *any* excuse which would justify a late filing by Community; in any event, "I was waiting to see if we might settle" is certainly not sufficient, *Medline*, 218 F.R.D. at 172. Community fails to demonstrate excusable neglect, and therefore its petition for a late filing will be denied and its "Proposed Response" will be stricken. *See id.* (affirming refusal to extend response deadline for party who was consistently dilatory and had already been granted additional time to respond).

With that preliminary issue resolved, the Court now turns to the merits of Cliff's motion for fees. Courts use the well-known "lodestar" method to determine a reasonable amount of fees. *E.g., People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1310 (7th Cir. 1996); *Hensley v. Eckerhart*, 461 U.S. 424, 433-37 (1983). Under this method, the court first determines the "lodestar" by multiplying the hours reasonably expended on the case by a reasonable hourly rate. *People Who Care*, 90 F.3d at 1310. The court may then adjust this award based on various factors, *see id.* at 1310 n.1, the "most critical" of which is the degree of success obtained by the movant, *Hensley*, 461 U.S. at 436. The movant bears the initial burden of documenting its fees to the satisfaction of the court; once it has done so, those fees are presumptively appropriate unless challenged by the opposing party. *Tomazzoli v. Sheedy*, 804 F.2d 93, 96 (7th Cir. 1986).

Cliff's petition includes billing records of the time for which it wishes to be reimbursed. (Aff. of Karin M. Zaner, Ex. A.) Unfortunately, several of the billing entries are vague, and others inappropriately group compensable time with time which appears unrelated to the motion to compel. The Court has reduced the compensable hours accordingly.[1] *See Stark v. PPM America, Inc.*, 354 F.3d 666, 674 (7th Cir. 2004) ("Because so many entries on the fee request were particularly vague, the judge reduced the hours by 30 percent . . . . the district judge's care should be commended"); *Tomazzoli*, 804 F.2d at 97 (affirming reduction of hours where attorney listed several tasks together and gave only a single total for the combined work); *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.*, 776 F.2d 646, 656 (7th Cir. 1985) (affirming reduction of hours where fee petitions were "vague, inconsistent, and lacking adequate identification of hours"). After these reductions, the following compensable time remains for each of Cliff's attorneys: 1.35 hours by Michael Logan, 6.3 hours by Karin Zaner, and 14.3 hours by Brian Clark.

Cliff urges rates of $325 per hour for Michael Logan, $240 per hour for Karin Zaner, and $225 per hour for Brian Clark. Zaner avers that her firm customarily charges these rates for the attorneys involved. (Zaner Aff. ¶ 7.) The burden thus shifts to Community to show why these rates should be lowered, *Stark*, 354 F.3d at 674-75, but Community sacrificed that opportunity by failing to file its response on time. Accordingly, the Court approves the rates submitted by

[1]Michael Logan's entry of 2-2-04 is reduced by 0.15 hours for vagueness. Logan's entry of 2-3-04 is struck entirely for vagueness. Brian Clark's entry of 2-16-04 is reduced by 1 hour for vagueness and inappropriate grouping of work. Clark's entry of 3-8-04 is reduced by 0.75 hours for vagueness. Clark's entry of 3-12-04 is reduced by 0.9 hours for vagueness. Clark's entry of 3-15-04 is reduced by 2.2 hours for inappropriate grouping. Clark's first entry of 3-17-04 is reduced by 2.1 hours for inappropriate grouping. Clark's entry of 3-25-04 is reduced by 0.15 hours for vagueness. Karin Zaner's entry of 3-29-04 is reduced by 1.5 hours for inappropriate grouping. (*See* Zaner Aff., Ex. A.)

Cliff.[2]

Multiplying the hours by the rates produces a lodestar amount of $5168.25.[3] However, the Court has "considerable discretion" to reduce the lodestar where the movant's victory was only partial. *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 559 (7th Cir. 1999). Here, Cliff's motion to compel was approximately 90% successful (*see* Docket # 43), and so the lodestar will be reduced by 10%, leaving Cliff with a final award of $4651.43.

To sum up, Community's "Verified Petition for Leave to Belatedly File Response" (Docket # 76) is DENIED, and the Clerk is hereby ORDERED to strike Community's "Proposed Response" (Docket # 77) from the record. Cliff's petition for fees is GRANTED, and the Clerk is ORDERED to enter a judgment of $4651.43 in attorney fees against Community and in favor of Cliff.

Enter for this 7th day of September, 2004.

/S/ Roger B. Cosbey
Roger B. Cosbey,
United States Magistrate Judge

[2]The billing rates of these Dallas attorneys are high by Fort Wayne standards, and this Court has discretion to "question the reasonableness of an out of town attorney's billing rate." *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 769 (7th Cir. 1982). However, Cliff avers that it used these attorneys because it has a long-standing relationship with their law firm, and Community fails to challenge that assertion, so the Court accepts that out-of-town counsel are appropriate for Cliff in this case. *See Spears*, 354 F.3d at 675 (holding that once the attorney provides evidence of his or her rate, the burden shifts to the opposing party to show why it should be lowered); *cf. Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1993) ("lawyers who fetch above-average rates are presumptively entitled to them, rather than to some rate devised by the court").

[3]For Logan, 1.35 hours times $325 equals $438.75. For Zaner, 6.3 hours times $240 equals $1512.00. For Clark, 14.3 hours times $225 equals $3217.50. These three figures total $5168.25.